

BEFORE THE RULES REVIEW COMMISSION

December 17, 2014

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In the Matter of 15A NCAC 2H .1030	)	ENVIRONMENTAL MANAGEMENT COMMISSION
	)	MEMORANDUM IN SUPPORT OF APPROVAL
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The rule entitled *Stormwater Requirements: Oil and Gas Exploration and Production*, proposed to be codified at 15A NCAC 2H.1030, was published in the June 2, 2014, edition of the North Carolina Register. The purpose of this rule is to regulate the treatment, discharge, and release from the site of stormwater potentially contaminated by the activities on an oil and gas production facility. Stormwater released from a site through a point source (a discernible, confined and discrete conveyance, such as a pipe or ditch) is regulated at 15A NCAC 2H .0126, which adopts by reference federal rules governing such discharges. The discharges regulated are limited to point source stormwater discharges associated with specific industrial activities. Oil and gas exploration and production activities are not included among those industrial activities due to an explicit exemption in the Clean Water Act, 33 U.S.C. §1342(l)(2). The Environmental Management Commission (EMC) has been prohibited from regulating point source discharges of stormwater from oil and gas exploration and production sites pursuant to the terms of N.C. Gen. Stat. §150B-19.3. However, in 2012, the General Assembly explicitly directed the EMC to adopt rules for the purpose of “[s]tormwater control for sites on which oil and gas exploration and development activities are conducted.” N.C. Gen. Stat. §113-391(a3)(1). Subsequently, in S.L. 2014-4, the General Assembly set a January 1, 2015 deadline for the adoption of the rules.

The direction from the General Assembly was not limited to the regulation of point source discharges of stormwater associated with oil and gas exploration and production facilities. It also encompassed stormwater releases from nonpoint sources, which the EMC regulates at 15A NCAC 2H part .1000, pursuant to N.C. Gen. Stat. §143-214.7. The rule proposed for codification at 15A NCAC 2H .1030 comprehensively regulates stormwater associated with oil and gas exploration and production activities, irrespective of whether such stormwater is conveyed to waters of the state via a point source or a nonpoint source.

Extensive public comment was received concerning proposed 15A NCAC 2H .1030, both in writing and orally at a public hearing held on July 1, 2014. No fewer than eleven commenters addressed proposed 2H .1030(c)(5), regarding recordkeeping, self-inspection and self-reporting. After careful consideration of those comments, among others, the Hearing Officer, EMC Commissioner Dr. Albert R. Rubin recommended revision of 2H .1030(c)(5), and the addition of a new (c)(6) and (c)(7), to specify, *inter alia*, requirements for record retention, for reporting within 24 hours of excursions, for periodic inspections, and for recording of inspections, observations and response actions.

At its meeting on November 13, 2014, the EMC adopted 15A NCAC 2H .1030 revised in accordance with the recommendations of the Hearing Officer, and the rule was submitted to the Rules Review Commission pursuant to N.C. Gen. Stat. §150B-21.2. Commission counsel has recommended that the

Commission object to the adopted 15A NCAC 2H .1030 because of the changes made to the version published June 2, 2014. This recommendation is based on a determination by counsel that the changes constitute a rule that differs substantially from the text of the proposed rule published in the North Carolina Register. N.C. Gen. Stat. §150B-21.2(g). Counsel asserts that, under N.C. Gen. Stat. §150B-21.2(g)(2), the adopted rule differs substantially from the proposed rule because the adopted rule addressed a subject matter or an issue that was not addressed in the text of the proposed rule, as published in the N.C. Register on June 2, 2014.

The proposed rule published on June 2, 2014, contained, at subsection (c)(5), a provision regarding recordkeeping, self-inspection and self-reporting which read as follows:

- (5) The Division shall establish record-keeping, self-inspection, and self-reporting permit requirements to insure effective site management attention, response actions, and control of the potential for polluted stormwater.

After considering comments received during the public comment period and the public hearing, the Hearing Officer recommended, and the EMC subsequently adopted, substitute language, which provided specific provisions for record-keeping, self-inspection, and self-reporting, responding, in part, to comments received during the public comment period. The revision amended subsection (c)(5), and added subsections (c)(6) and (c)(7):

- (5) All records required by this Rule shall be kept on site for the life of the permit.
- (6) The permittee shall report all bypasses, malfunctions, failures, and unpermitted discharges of the stormwater control system to the Division's Regional Office within 24 hours of becoming aware of the conditions.
- (7) During the initial site clearing and grading phase of site operations, the permittee shall inspect all erosion control measures weekly and after any storm event greater than 0.5" of rain per 24-hour period; and shall keep written records of the inspections, observations, and response actions. The Division's acceptance of the certification required in Subparagraph (3) of this Paragraph shall be used to release the permittee from the inspections and record keeping required during the initial site clearing and grading phase.

The Environmental Management Commission (EMC) believes that it is the very purpose of public participation and public comment in the rulemaking process to persuade or inform the agency of the need to revisit, refine or elaborate upon proposed rule language to better realize the purpose and intent of the organic statute. In this case, the proposed rule language modestly, and perhaps, ineffectively, addressed record-keeping, self-inspection, and self-reporting in a way that relegated specification and explicit identification of those requirements to the permit issuance process.

In fact, the language that was adopted, subsections (c)(5), (c)(6) and (c)(7), mirrors the record-keeping, self-inspection, and self-reporting provisions of the already-issued general permit for stormwater for construction activities. But for a Clean Water Act exemption, the development of an oil and gas

production site would constitute construction activity within the meaning of that term in the general permit. That federal exemption applied to development of oil and gas production sites in North Carolina because of N.C. Gen. Stat. §150B-19.3, prohibiting environmental regulation by the Environmental Management Commission more stringent than requirements imposed by the federal law and rules.<sup>1</sup> Obviously, any regulation by the EMC would be more stringent than no regulation as provided by the federal exemption in the Clean Water Act. However, the General Assembly, at Section 2(e) of S.L. 2014-4, carved out an exception from the limitation of N.C. Gen. Stat. §150B-19.3 specific to rules adopted by the EMC with respect to the development of oil and gas production sites, including management and control of stormwater associated with those activities.

The community whose members would be conducting the development activities for oil and gas production sites is a subset of the regulated community subject to the requirements imposed by the general permit for the management of control of stormwater for construction activities. In reviewing a rule that provides that the Division would “establish record-keeping, self-inspection, and self-reporting permit requirements to insure effective site management attention, response actions, and control of the potential for polluted stormwater,” the regulated individuals and entities would likely assume those permit requirements would be substantially identical to the permit requirements with which they were already familiar from their other regulated activities. Indeed, the public comments reflect this understanding, and, in fact, one commenter requested a change essentially matching the language which went into the adopted rule. The subject matter and issues of record-keeping, self-inspection, and self-reporting permit requirements to insure effective site management attention, response actions, and control of the potential for polluted stormwater were indeed addressed in the rulemaking. Interested parties acknowledged as much as their comments addressed the issue, and requested elaboration in the rule, rather than permit-by-permit. The Hearing Officer and the EMC considered the comments and responded appropriately. This is the role public participation is designed to play in the rulemaking process. In the case of this rule, it was clear that the public availed itself of the opportunity to participate and it was heard. This subject matter and this issue were aired thoroughly and the process worked according to design.

Even if the facts and circumstances peculiar to this regulatory program were not as compelling, it does not seem to be a proper interpretation of N.C. Gen. Stat. §150B-21.2(g)(2) to require a return to public notice for a change to language providing specificity for the regulated community and the public when the proposed rule language clearly addressed that fact that the agency would be putting more specific requirements in permits. It serves the regulated community and the public well to have such requirements clearly set out in the rule when those requirements are likely to be virtually identical permit-to-permit. A contrary interpretation would discourage agencies from thoughtfully responding to public comments in this regard, or it could begin a cycle of revision and renote that would be lengthy, at best, and potentially frustrate the consideration of comments on issues well within the reasonable anticipation of those interested the rule. The purpose of the language at (g)(2) is to prevent agencies from making changes or introducing requirements that could not have been reasonably anticipated by

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<sup>1</sup> N.C. Gen. Stat. §150B-19.3 provides limited exceptions, none of which were applicable prior to the adoption of S.L. 2014-4.

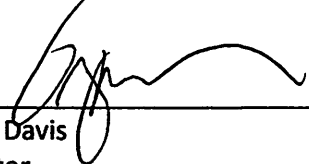
persons interested in participating in the rulemaking process. The fact that comment was received that was incorporated by the EMC demonstrates that the subject matter and issue were addressed, discussed and specifically considered. The change made in response to those public comments does not need to go back through yet another round of notice and comment, because that process worked as it was designed to do the first time.

It is also worthy of note that S.L. 2014-4 expressly provides that rules adopted by the EMC and other agencies tasked with developing an appropriate regulatory program for activities related to the management of oil and gas exploration, development and production activities are subject to review by the General Assembly in the next session of the General Assembly following approval by the Commission. The General Assembly will thus review any provisions of the rules that may impose restrictions or obligations on regulated parties should the Commission approve the rule.

On behalf of the EMC, we respectfully request that the Commission approve 15A NCAC 2H .1030 as presented.

Respectfully submitted:

  
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Department of Justice

  
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